St. John's Law Review

Volume 53
Number 1 *Volume 53, Fall 1978, Number 1*

Article 5

CPLR 214-a: Physician Who Fraudulently Concealed His Malpractice from Patient Held Estopped from Raising Statute of Limitations as a Defense

Alan Sorkowitz

tention is paid to the various approaches which have been taken by the appellate courts in New York in assessing *Seider's* viability in light of *Shaffer v. Heitner.* These and other cases have been chosen to aid the practitioner in his quest to stay abreast of developments in state practice. It is hoped that *The Survey's* treatment of noteworthy cases will accomplish this basic goal.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 214-a: *Physician who fraudulently concealed his malpractice from patient held estopped from raising statute of limitations as a defense*

Traditionally, a cause of action for medical malpractice has been held to accrue at the time the negligent treatment is given.[1] Although the injury may not be discovered for several years following treatment, New York, with limited exceptions,[2] has refused to adopt as a general principle that such a cause of action accrues at the time the malpractice is discovered.[3] Recently, however, in *Simcuski v. Saeli,*[4] the Court of Appeals, without disturbing the general accrual rule, held that a physician may be estopped from pleading the statute of limitations if his intentional concealment of malpractice led his patient to delay commencement of a lawsuit.[5] In addition, the Court held that a plaintiff who has foregone remedial treatment as a result of the doctor's misrepresentations may maintain a separate action for fraud.[6]

The plaintiff in *Simcuski* was injured as a result of surgery performed in October 1970 to remove a node from her neck.[7] According to the allegations contained in the complaint, the surgeon attempted to conceal his negligence by directing the plaintiff to a

[1] *See* Davis v. City of New York, 38 N.Y.2d 257, 342 N.E.2d 516, 379 N.Y.S.2d 721 (1975) (per curiam); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Dobbins v. Clifford, 39 App. Div. 2d 1, 330 N.Y.S.2d 743 (4th Dep't 1972).

[2] *See* notes 25-26 *infra.*

[3] *See, e.g.,* Davis v. City of New York, 38 N.Y.2d 257, 342 N.E.2d 516, 379 N.Y.S.2d 721 (1975) (per curiam); Schiffman v. Hospital for Joint Diseases, 36 App. Div. 2d 31, 319 N.Y.S.2d 674 (2d Dep't 1971); Budoff v. Kessler, 284 App. Div. 1049, 135 N.Y.S.2d 717 (2d Dep't 1954) (per curiam).

[4] 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978), *rev'g* 57 App. Div. 2d 711, 395 N.Y.S.2d 776 (4th Dep't 1977).

[5] 44 N.Y.2d at 446, 377 N.E.2d at 715, 406 N.Y.S.2d at 261.

[6] *Id.* at 451-52, 377 N.E.2d at 718, 406 N.Y.S.2d at 264.

[7] *Id.* at 447, 377 N.E.2d at 715, 406 N.Y.S.2d at 261. In the course of the operation, nerves in the plaintiff's neck and branches of her cervical plexus were injured, allegedly as a result of the defendant's negligence.

program of physiotherapy which he knew would not remedy her problem.[8] After 4 years of unsuccessful physiotherapy the plaintiff consulted other physicians and was advised that her condition, which might have been cured with early treatment, had become permanent.[9] The plaintiff commenced her action against the surgeon in April 1976, more than 5 years after the surgery.[10] The defendant moved to dismiss the complaint, claiming that, since the suit was one for medical malpractice, it was barred by the 3-year statute of limitations. The Supreme Court, Onondaga County, denied the motion, holding that the complaint supported claims for both fraud and malpractice, and that the latter was not time barred since the "plaintiff had shown the elements of an equitable estoppel to overcome the limitations defense."[11] The Appellate Division, Fourth Department, reversed, finding that no cause of action for fraud had been stated and holding that an allegation of fraudulent concealment cannot operate to extend the then applicable 3-year limitations period for bringing a medical malpractice suit.[12]

On appeal, the Court of Appeals reversed the appellate division's ruling, noting that the New York courts have long recognized the equitable estoppel principle in cases where the defendant attempts to rely on the statute of limitations after having intentionally concealed the tortious conduct and prevented the plaintiff from

---

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] 57 App. Div. 2d at 712, 395 N.Y.S.2d at 777. There was no question that the fraud cause of action was timely since, under the CPLR, the time limited for commencing this cause of action is 6 years from the fraud or 2 years from the discovery, whichever is greater. *Compare* CPLR 203(f) (Supp. 1978-1979) *with* CPLR 213(8) (Supp. 1978-1979).

[12] 57 App. Div. 2d at 712, 395 N.Y.S.2d at 777. The court noted that, even if the equitable estoppel theory were available, the doctrine of laches would preclude the plaintiff from invoking it since she had waited 18 months after learning of the alleged malpractice to institute the action. *Id.* at 712, 395 N.Y.S.2d at 777-78; *see* Ortiz v. City of New York, 28 App. Div. 2d 1098, 284 N.Y.S.2d 370 (1st Dep't 1967) (per curiam); *cf.* 509 Sixth Ave. Corp. v. New York City Transit Auth., 24 App. Div. 2d 975, 265 N.Y.S.2d 429 (1st Dep't 1965) (per curiam) (laches doctrine applied despite mutual agreement to stay action). In addition, the court rejected the plaintiff's contention that the "continuous treatment" exception, *see* note 26 and accompanying text *infra*, should be applied to delay accrual of the cause of action. As the plaintiff's counsel did not assert this theory at trial, the appellate division ruled that it had no power to entertain it on appeal. 57 App. Div. 2d at 712, 395 N.Y.S.2d at 778; *see* Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 126 N.E.2d 271 (1955); Boll v. Shanly, 34 App. Div. 2d 875, 310 N.Y.S.2d 847 (3d Dep't 1970). Finally, the appellate division rejected the trial court's finding that a separate fraud claim existed, stating that the defendant's concealment of his negligence did not constitute "a separate and independent wrong." 57 App. Div. 2d at 712, 395 N.Y.S.2d at 777.

instituting a timely action.[13] Writing for a unanimous Court,[14] Judge Jones stressed that the doctrine is particularly suited to a situation in which a patient is lulled into inaction because of confidence in her physician.[15]

In addition, Judge Jones observed that the plaintiff's complaint adequately stated all the elements necessary to establish a cause of action in intentional fraud.[16] Reasoning that the defendant's inten-

[13] 44 N.Y.2d at 448-49, 377 N.E.2d at 716, 406 N.Y.S.2d at 262; *see* General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966); Erbe v. Lincoln Rochester Trust Co., 13 App. Div. 2d 211, 214 N.Y.S.2d 849 (4th Dep't 1961). The doctrine has often been applied in cases involving breach of a fiduciary duty. The outstanding case in this regard is *General Stencils,* where the Court declared that to allow the defendant's "affirmative wrongdoing and concealment" to deprive the plaintiff of the chance to file a timely action would be to allow the former to benefit from his own wrong. 18 N.Y.2d at 128-29, 219 N.E.2d at 171, 272 N.Y.S.2d at 339. The plaintiff company had commenced an action against its former bookkeeper alleging conversion of monies which had been in a petty cash fund. The Court held that the defendant's intentional concealment of her own tortious conduct entitled the plaintiff to a determination of whether estoppel should be applied. The same rationale was controlling in *Erbe.* There, the trustees of an estate were estopped from raising a statute of limitations defense against the plaintiff-beneficiaries because they intentionally had violated their fiduciary duty by conveying false information. Following the *Erbe* and *General Stencils* cases, the *Simcuski* Court was reluctant to allow the defendant to improve his position by taking advantage of his own wrong. *See* Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910). *See also* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-33 (1959); Clarke v. Gilmore, 149 App. Div. 445, 133 N.Y.S. 1047 (1st Dep't 1912); Safrin v. Friedman, 27 Misc. 2d 687, 96 N.Y.S.2d 627 (Sup. Ct. Kings County 1950); Comment, *Estoppel and the New York Statute of Limitations,* 26 ALB. L. REV. 38 (1962).

[14] Judge Cooke concurred in the majority's reasoning but declined to "subscribe to all of the implications which may affect this or other cases when the merits may be reached by motion or trial." 44 N.Y.2d at 454, 377 N.E.2d at 720, 406 N.Y.S.2d at 266 (Cooke, J., concurring). Judge Fuchsberg also filed a separate concurring opinion. *See* note 20 and accompanying text *infra.*

[15] 44 N.Y.2d at 449, 377 N.E.2d at 716, 406 N.Y.S.2d at 263. The decision in *Simcuski* appears to be the first time a New York court has applied the equitable estoppel theory to a medical malpractice suit. In two earlier cases, Ranalli v. Breed, 277 N.Y. 630, 14 N.E.2d 194 (1938), and Rokita v. Germaine, 8 App. Div. 2d 620, 185 N.Y.S.2d 272 (2d Dep't 1959) (mem.), the courts refused, without explanation, to extend estoppel principles to medical malpractice causes of action. These cases, however, were decided before *General Stencils. See* note 13 *supra.* Although *General Stencils* did not involve a malpractice action, the *Simcuski* Court held that the broad estoppel principles of that case superseded the questionable authority of *Ranalli* and *Rokita.*

Other jurisdictions have recognized equitable estoppel in cases involving medical malpractice. *See* Crossett Health Center v. Croswell, 221 Ark. 874, 256 S.W.2d 548 (1953); Stafford v. Shultz, 42 Cal. 2d 767, 270 P.2d 1 (1954) (en banc); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956); Adams v. Ison, 249 S.W.2d 791 (Ky. 1952); Kroll v. Vanden Berg, 336 Mich. 306, 57 N.W.2d 897 (1953).

[16] 44 N.Y.2d at 451, 377 N.E.2d at 718, 406 N.Y.S.2d at 264. The *Simcuski* Court stated that, in order to establish the defendant's liability for fraud, the plaintiff would be required to prove by clear and convincing evidence that: (1) the physician was aware that his own negligence had caused injury; (2) the physician made a "material factual misrepresentation"

tionally fraudulent conduct was analytically distinguishable from the negligent conduct that gave rise to his malpractice liability, the *Simcuski* Court saw no reason to prevent the plaintiff from maintaining a separate fraud claim[17] and taking advantage of the applicable 6-year limitations period.[18] Judge Jones noted, however, that the damages recoverable under this theory would be limited to the amount attributable to the fraud itself, "as distinguished . . . from damages occasioned by the alleged malpractice."[19] Significantly, the Court emphasized that mere concealment of medical malpractice would not be sufficient in itself to support an action in fraud.[20]

While *Simcuski* can be interpreted as an application of traditional equitable principles[21] to a medical malpractice suit, the hold-

---

with knowledge of the statement's falsity; (3) the physician intended to mislead the patient; and (4) the patient relied upon the misrepresentation and consequently did not seek further treatment. 44 N.Y.2d at 453-54, 377 N.E.2d at 720, 406 N.Y.S.2d at 265; *see* Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958).

[17] 44 N.Y.2d at 452, 377 N.E.2d at 718, 406 N.Y.S.2d at 264. Suits against physicians for fraudulent misrepresentation have been permitted in the past. *See, e.g.*, Sherman v. Board of Regents, 24 App. Div. 2d 315, 266 N.Y.S.2d 39 (3d Dep't 1966), *aff'd mem.*, 19 N.Y.2d 679, 225 N.E.2d 559, 278 N.Y.S.2d 870 (1967); Calabrese v. Bickley, 208 Misc. 407, 143 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1955), *modified mem.*, 1 App. Div. 2d 874, 150 N.Y.S.2d 542 (1st Dep't 1956).

[18] 44 N.Y.2d at 452, 377 N.E.2d at 718, 406 N.Y.S.2d at 264; *see* CPLR 213(8) (Supp. 1978-1979). The Court emphasized, however, that mere concealment of malpractice by the physician does not constitute fraud. *See* Golia v. Health Ins. Plan, 6 App. Div. 2d 884, 177 N.Y.S.2d 550 (2d Dep't 1958) (per curiam), *aff'd mem.*, 7 N.Y.2d 931, 165 N.E.2d 578, 197 N.Y.S.2d 735 (1960); Conklin v. Draper, 229 App. Div. 227, 241 N.Y.S. 529 (1st Dep't 1930), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1931); Tulloch v. Haselo, 218 App. Div. 313, 218 N.Y.S. 139 (3d Dep't 1926).

[19] 44 N.Y.2d at 452-53, 377 N.E.2d at 718, 406 N.Y.S.2d at 265.

[20] *Id.* The Court did indicate, however, that mere concealment might be enough to invoke the equitable estoppel doctrine. *Id.* Judge Fuchsberg concurred in the result, but strenuously criticized the conclusion that "mere 'concealment . . .' does not toll the Statute of Limitations." *Id.* at 455, 377 N.E.2d at 720, 406 N.Y.S.2d at 266 (Fuchsberg, J., concurring). This objection, however, appears unfounded in view of the majority's carefully drawn distinction between the use of concealment as a predicate for invoking the equitable estoppel doctrine and the use of concealment as a basis for a separate fraud claim. *But see* CPLR 201, commentary at 19 (Supp. 1978-1979). Judge Fuchsberg was also critical of the majority's assumption that passage of the new CPLR 214-a, *see* note 23 *infra*, constituted a "general policy direction" of the legislature towards restricted liability for the physician. 44 N.Y.2d at 456, 377 N.E.2d at 721, 406 N.Y.S.2d at 267 (Fuchsberg, J., concurring). He argued that such an assumption was unfounded in view of the failure of recent efforts to limit physician's liability. *See, e.g.*, REPORT OF THE SPECIAL ADVISORY PANEL ON MEDICAL MALPRACTICE OF THE STATE OF NEW YORK (1976); N.Y.S. 9, 200th Sess. (1977); N.Y.A. 3290, 200th Sess. (1977). Judge Fuchsberg concluded that "[w]hen thus rejected, such efforts [to restrict the physician's liability period]—whether fueled by legislative lobbying, or entrancing editorializing, or just plain propagandizing—form no foundation for public policy." 44 N.Y.2d at 456, 377 N.E.2d at 720-21, 406 N.Y.S.2d at 267 (Fuchsberg, J., concurring).

[21] That a defendant's improper role in delaying a plaintiff's suit may prevent him from raising the time bar as a defense is well settled. *See* General Stencils, Inc. v. Chiappa, 18

ing may also be viewed as a further recognition of the need to afford relief to an injured plaintiff who is prevented from discovering the underlying malpractice until after the statute of limitations has run.[22] It was a similar concern that prompted the legislature to codify certain judicially-created exceptions to the malpractice accrual rule when it enacted CPLR 214-a.[23] The view that a plaintiff should have the opportunity to gain knowledge of his legal rights before the limitations period expires was influential in the codification of the "foreign object" doctrine,[24] which delays accrual of the cause of action until the plaintiff discovers that an object was negligently left in his body.[25] The adoption of the "continuous treat-

N.Y.2d 125, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966). This rule remains firm despite the strong policy of keeping stale claims out of court which underlies all statutes of limitations. *See* Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119, 81 N.E.2d 45 (1948); Conklin v. Furman, 48 N.Y. 527 (1872); Vastola v. Maer, 48 App. Div. 2d 561, 370 N.Y.S.2d 955 (2d Dep't 1975); Note, *The New York Statutes of Limitations: Distinctions Without Function,* 1 SYRACUSE L. REV. 471 (1950).

[22] *See* CPLR 214, commentary at 78 (Supp. 1978-1979). Some states have enacted statutes explicitly providing that the action for malpractice accrues when the patient discovers the facts giving rise to the action. *See, e.g.,* KY. REV. STAT. ANN. § 413.140 (Supp. 1978); MICH. COMP. LAWS ANN. § 600.5838 (1967). Other states have statutory provisions delaying the running of the limitations period if the defendant has concealed material facts. *See, e.g.,* CONN. GEN. STAT. § 52-595 (1977). *See generally* C. STETLER & A. MORITZ, DOCTOR AND PATIENT AND THE LAW 389 (1962); Sacks, *Statutes of Limitations and Undiscovered Malpractice,* 16 CLEV. MAR. L. REV. 65, 72 (1967).

[23] CPLR 214-a, which applies to all medical malpractice actions arising from "any act, omission or failure occurring on or after" July 1, 1975, *see* ch. 109, § 37, [1975] N.Y. Laws 157 (McKinney), provides:

> An action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; provided, however, that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. For the purpose of this section the term "continuous treatment" shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition. For the purpose of this section the term "foreign object" shall not include a chemical compound, fixation device or prosthetic aid or device.

[24] CPLR 214-a was enacted as part of an omnibus malpractice bill which represented a compromise among the various interests involved. CPLR 214-a, commentary at 98 (Supp. 1978-1979). For this reason, it is difficult to identify the policy considerations underlying the legislature's action. It may be assumed, however, that the legislature, in codifying the "foreign object" doctrine, implicitly accepted the reasoning of the courts which created it. *Id.*

[25] *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Murphy v. St. Charles Hosp., 35 App. Div. 2d 64, 312 N.Y.S.2d 978 (2d Dep't 1970); LeVine v. Isoserve, Inc., 70 Misc. 2d 747, 334 N.Y.S.2d 796 (Sup. Ct. Albany County 1972). The "foreign object" doctrine is based upon the improbability of false claims

ment" exception, which postpones accrual until the doctor-patient relationship is terminated for purposes of treatment of the particular disorder,[26] also reflects a legislative recognition of the need to mitigate the harsh effects of the traditional accrual rule.[27] Thus, the *Simcuski* decision appears consistent with earlier legislative and judicial pronouncements.

Moreover, while the cause of action in *Simcuski* was not governed by CPLR 214-a,[28] it appears certain that the Court's reasoning will be applicable to malpractice suits arising under the new statute. Although CPLR 214-a may be construed as providing the exclusive methods for delaying accrual of a medical malpractice cause of action, such an interpretation would not detract from the vitality of the *Simcuski* holding. Under *Simcuski,* the physician's fraudulent concealment of his own negligence does not result in the postponement of accrual or a tolling of the limitations period. Rather, the effect of the decision is simply to prohibit the defendant from using an otherwise valid statute of limitations defense as a shield when he has intentionally concealed necessary information from the plaintiff.

Unfortunately, the *Simcuski* decision does not provide specific guidelines for determining when the equitable estoppel doctrine may be utilized. Although it seems clear that something less than affirmative misrepresentations may be sufficient, the precise degree of fraudulent intent that must be proven before a plaintiff may invoke the *Simcuski* rule remains uncertain.[29] This question will be resolved only after the lower courts have had an opportunity to

---

and the likelihood that the injury will go undetected. *See* 24 N.Y.2d at 430, 248 N.E.2d at 874, 301 N.Y.S.2d at 27. *See generally* Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions,* 47 CORNELL L.Q. 339 (1962); *The Survey,* 47 ST. JOHN'S L. REV. 148, 153 (1972); *The Survey,* 46 ST. JOHN'S L. REV. 147, 151 (1971); *see also* Note, *The Statute of Limitations in Actions for Undiscovered Malpractice,* 12 WYO. L.J. 30 (1957).

[26] The continuous treatment doctrine was originally established in Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), wherein the Court stated: "It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician . . . ." *Id.* at 156, 187 N.E.2d at 781, 237 N.Y.S.2d at 321-22; *see* O'Laughlin v. Salamanca Hosp. Dist. Auth., 36 App. Div. 2d 51, 319 N.Y.S.2d 128 (4th Dep't 1971). *See generally* Comment, *Medical Malpractice in New York,* 27 SYRACUSE L. REV. 657, 711-17 (1976).

[27] *See* note 26 *supra.*

[28] The alleged acts of negligence in *Simcuski* were committed well before July 1, 1975, the effective date of the new statute. 44 N.Y.2d at 447, 377 N.E.2d at 715, 406 N.Y.S.2d at 261; *see* note 23 *supra.*

[29] The *Simcuski* Court's exception to the general limitations rule presumably could be invoked when the physician merely fails to divulge his malpractice to his patient, or it may be applicable only when "the doctor, by fraudulent representation, conceals his wrongdoing." CPLR 214-a, commentary at 82-83 (Supp. 1977-1978).

apply *Simcuski* on a case-by-case basis. It is submitted that, in defining the boundaries of the equitable estoppel doctrine, the courts will have to be particularly careful to preserve the requirement of intentional concealment. In the absence of such a requirement, the application of the *Simcuski* reasoning could result in the evolution of a rule resembling a "date of discovery" accrual rule. Since the legislature apparently rejected the "date of discovery" theory when it enacted CPLR 214-a,[30] it would be inappropriate for the courts to adopt it indirectly through the use of equitable estoppel principles.

Alan Sorkowitz

CPLR 217: Four-month limitation period governing article 78 proceeding to review results of civil service-type examination held to begin running when final eligibility list published

CPLR 217 requires that an article 78 proceeding[31] "be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner."[32] Generally, a determination is considered to be final and binding, and the 4-month limitation period begins to run, only when the petitioner is actually

[30] As early as 1942, the legislature rejected a proposal to establish a "discovery rule." *See* [1942] N.Y. LAW REV. COMM'N REP. 141, 167-74. Were it not for the requirement of intentional concealment, the determinative date in applying the statute of limitations would be the date of plaintiff's discovery of the negligence. CPLR 214-a continues the judicially created exceptions to the accrual rule in limited form but does not establish a general date-of-discovery rule. *See* Memorandum of State Executive Department on Medical Malpractice, *reprinted in* [1975] N.Y. Laws 1599 (McKinney).

[31] CPLR 7801-7806 provide the statutory framework for bringing a special proceeding against a judicial, quasi-judicial or administrative officer. In general, article 78 encompasses remedies previously available through the common-law prerogative writs of certiorari, mandamus and prohibition. CPLR 7801-7802 (1963). The proceeding is usually brought at a special term of the supreme court. CPLR 7804(b) (1963). Article 78 proceedings against a justice of the supreme court or a judge of the county court, however, are brought in the appellate division. CPLR 506(b)(1) (1976). *See generally* D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE §§ 557-561 (1978); 8 WK&M ¶¶ 7801.01, .04, 7802.01.

[32] CPLR 217 (1972) provides in pertinent part:

> Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty . . . .

See Verbanic v. Nyquist, 41 App. Div. 2d 466, 344 N.Y.S.2d 406 (3d Dep't 1973); J. Hungerford Smith Co. v. Ingraham, 32 App. Div. 2d 188, 301 N.Y.S.2d 266 (3d Dep't 1969) (per curiam).